Supreme Court, U. S.
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No. 80-203

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J. J. CURRAN and JACQUELYN L. CURRAN,
Respondents.

## BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER A PRE-DISPUTE ARBITRATION AGREEMENT BETWEEN A COMMODITIES CUSTOMER AND HIS BROKER, WHICH IS ADMITTEDLY NOT IN COMPLIANCE WITH 17 C.F.R. SECTION 180.3 AND WOULD ADMITTEDLY BE UNENFORCEABLE IF ENTERED INTO AT THE PRESENT DATE, CAN BE ENFORCED AGAINST RESPONDENTS IN THE INSTANT CASE MERELY BECAUSE THE CONTRACT WAS ENTERED INTO PRIOR TO THE ESTABLISHMENT OF SPECIFIC GUIDELINES FOR SUCH AGREEMENTS?

2.

WHETHER THE COMMODITY EXCHANGE ACT CREATES AN IMPLIED RIGHT OF ACTION FOR FRAUD IN FAVOR OF A CUSTOMER AGAINST HIS BROKER?

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## BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents, John J. Curran and Jacquelyn L. Curran ("Currans") request that a Writ of Certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 12, 1980.

## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is not yet officially reported and is unofficially reported at (Current Binder) Fed. Sec. L. Rep. (CCH) Para. 97,390. This opinion is fully set forth in petitioner's appendix to its petition for a writ of certiorari at pages A-1 — A-38. (All page citations hereinafter shall refer to the petition for a writ of certiorari filed in the instant case, unless otherwise noted.) The opinion of the United States District Court for the Eastern District of Michigan (Southern Division) is not officially reported. This opinion is fully set forth at pages A-39 — A-49.

## STATEMENT OF THE CASE

During the year 1973, the Currans (respondents-plaintiffs) opened several accounts with Merrill Lynch, Pierce, Fenner & Smith, Inc. (petitioner-defendant), at least two of which were for the purpose of trading in commodity futures. The accounts were opened in reliance upon numerous representations by petitioner as to petitioner's trading acumen and the profits which would inure to respondents as participants in petitioner's Specialized Guided Account Trading Program.

Certain conditions were placed by petitioner upon respondents' participation in the Program. Most importantly, respondents agreed to participate in the Program for at least eighteen (18) months and to follow all of petitioner's trading "suggestions." Other aspects of the Program, as represented to respondents, were periodic reviews by the local Speculative Sales Department manager and specific stop loss procedures

designed to limit the amount of capital which could be lost by respondents.

After the first Program account was opened by respondents on April 5, 1973 by depositing $100,000 with petitioner, petitioner made all trading decisions and exercised complete control over respondents' accounts with complete reliance by respondents upon petitioner's actions and trading decisions. Initially, respondents realized profits on the trading activity in the accounts and at one point withdrew $101,007.80. Thereafter, the accounts declined drastically in value and respondents suffered substantial losses due to improper and excessive trading activities and the failure to observe the "stop loss" procedures represented to exist as part of the Program. On several occasions, respondent J. J. Curran requested that the accounts be closed and that respondents be "cashed out." On each such occasion, except the final one (at which time respondents' capital had been reduced to approximately $6,000), petitioner refused or talked Mr. Curran out of cashing out on the ground that respondents were required to stay in the Program for eighteen months.

Finally, in April 1974, petitioner relented to respondents' demands that their accounts be closed. At that time, respondents had suffered a decline in the value of their accounts in the sum of approximately $175,000 and had paid commissions of approximately $44,500.

This case was commenced by the filing of a complaint by respondents J. J. Curran and Jacquelyn L. Curran in the United States District Court for the Eastern District of Michigan on April 5, 1976. Respondents alleged in support of the District Court's jurisdiction that the amount in controversy was in excess of $10,000 and that

jurisdiction in the federal courts was proper under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78(aa) (hereinafter referred to as the "1934 Act"), by Section 22(a) of the Securities Act of 1933, 15 U.S.C. Section 77(v) (hereinafter the "Securities Act"), by Sections 1331, 1332 and 1337 of Title 28 of the United States Code and by pendent jurisdiction. The case was assigned to the Honorable Thomas P. Thornton.

Thereafter, defendant-petitioner moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of plaintiffs'-respondents' complaint on the grounds that the limitation period agreed upon in writing by the parties expired prior to the filing of the Complaint. Alternatively, petitioner requested that Counts IV, V and VI of the Complaint be dismissed for failure to state claims under the 1934 Act or the Securities Act. Finally, petitioner moved pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. Section 3, for a stay of remaining claims pursuant to a written agreement to arbitrate contained in the Customer Account Agreements signed by plaintiffs.

On December 27, 1976, Judge Thornton issued a Memorandum Re Motion To Dismiss and Stay Proceedings. In this opinion, which is reproduced at pages A-39 through 49, the Court concluded that the commodities arrangements between the parties herein did not constitute a "security." Thus, the Court granted petitioner's alternate motion to dismiss "those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Act of 1934, to wit: Counts IV, V and VI of the Complaint."

By his memorandum opinion and his order dated February 23, 1977, Judge Thornton ordered that "Counts

IV, V and VI of Plaintiff's Complaint be and the same hereby are dismissed." There were no words of limitation whatsoever in the order, which apparently dismissed Counts IV, V and VI, including claims under the Commodity Exchange Act (hereinafter "CEA"), in their entirety. See page A-50. Thus, one ground for respondents' appeal to the Sixth Circuit was that the District Court erroneously dismissed respondents' claims under the Commodity Exchange Act. (Issue #6, Plaintiffs' Statement of Issues on Appeal. See Appendix to Respondents' Brief at page A-2.) In respondents' brief before the Sixth Circuit, it was argued that "a private cause of action exists for violations of the CEA." (Pg. 28 of Brief For Plaintiffs-Appellants. See Appendix to Respondents' Brief at page A-4.)

In an opinion decided and filed on May 12, 1980, the Sixth Circuit Court of Appeals construed the District Court's order of dismissal as granting only the relief requested by the motion to dismiss, which related only to claims under the Securities Act and the 1934 Act. Thus, the pleadings and allegations purporting to state a claim under the CEA were unimpaired by the District Court's order of dismissal. (Pages A-23 -- A-24, fn. 16). The Sixth Circuit Court of Appeals then proceeded to agree with the position set forth in the respondents' brief therein (which position was not opposed by the petitioner herein) and expressly held that a private remedy *did* exist under the Commodity Exchange Act.

The Sixth Circuit Court of Appeals also held that the pre-dispute arbitration agreement in the instant case did not comply with CFTC Reg. Section 180.3 and therefore was unenforceable. Petitioner herein would be unable to dispute this decision by the Court of Appeals if it were applied to agreements presently entered into,

but petitioner objects because this regulation was retroactively applied to nullify the pre-dispute arbitration agreement in this case.

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS' RETROACTIVE APPLICATION OF COMMODITY FUTURES TRADING COMMISSION REG. SECTION 180.3 IS NOT IN CONFLICT WITH ANY DECISIONS OF ANY FEDERAL COURTS AND IS NOT AN ISSUE WHICH WARRANTS DETERMINATION BY THIS COURT.

The Court of Appeals correctly held that a 1973 pre-dispute arbitration agreement entered into between respondents and petitioner was void. In urging review by this Court, petitioner contends that this creates a conflict "in principle" with prior United States Supreme Court decisions. (Page 26). Respondents see no conflicts, whether "in principle" or otherwise. The only other Court of Appeals to consider this precise issue has been the Second Circuit. See *Ames* v. *Merrill Lynch, Pierce, Fenner and Smith*, 567 F.2d 1174 (2d Cir. 1977). The *Ames* decision was heavily relied upon in the instant controversy and was followed by the Court of Appeals herein.

Petitioner attempts to portray itself as the victim of a great unfairness in the retroactive nullification of its pre-dispute arbitration agreement. Unfairness would exist, however, only if petitioner's pre-dispute arbitration agreements were permitted to stand. The courts in both *Ames* and the instant controversy recognized this pre-dispute arbitration agreement for

what it really is — a contract of adhesion. Oral testimony before the Commodity Futures Trading Commission by a representative of petitioner herein established that "a customer could not do futures business with the firm if he refused to sign a predispute arbitration agreement." (Page A-22). Both courts also recognized that plaintiffs were not attempting to escape from an arbitration award which had previously been entered. Thus, petitioner was deprived of no vested rights which had accrued. (Pages A-21 — A-22, fn. 15).

Finally, assuming *arguendo* that both *Ames* and the Court of Appeals herein were mistaken in the retroactive application of the CFTC Regulation Section 180.3, this issue is still not one which this Court should exercise its discretion to review. This Court is well aware of the limited circumstances under which a writ of certiorari shall issue. Thus, it has been stated that —

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Taft, C. J., in Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. 33, at 2 (1922). Respondents wish to emphasize that any decision on

the retroactive application of a Commodity Futures Trading Commission regulation which became effective on November 29, 1976 — nearly four years ago — has limited, if any, public importance. With regard to pre-dispute arbitration agreements entered into on or after November 29, 1976 the law is perfectly clear. With respect to pre-dispute arbitration agreements entered into before November 29, 1976, the decision in the instant controversy and the *Ames* decision establish the requisite legal principles. Any review of the present decision by this Court would affect few persons besides the litigants in the instant controversy.

CFTC Reg. Section 180.3 was construed properly by the Sixth Circuit Court of Appeals. As noted in the decision of the Court, a contrary result would run contrary to the notion "that customers who had entered into agreements before adoption of the regulation needed and were entitled to the protections of the rule no less than those customers who signed agreements after November 29, 1976." (Page A-23).

## II.

## THE ISSUE WHETHER THE COMMODITY EXCHANGE ACT SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION HAS BEEN CORRECTLY DETERMINED BY THE COURT OF APPEALS AND THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR OPINIONS OF THIS COURT.

Petitioner maintains that the decision in the instant controversy conflicts "in principle" with prior decisions of this Court, particularly *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche*

Ross & Co. v. *Redington*, 442 U.S. 560 (1979). The cases cited by petitioner are not directly controlling, but they merely delineate a methodology to determine whether a private right of action may be implied from a federal statute. The Sixth Circuit Court of Appeals was aware of these decisions (Page A-30) and followed a painstaking analysis of the four factors deemed relevant by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). (Pages A-29 — A-34).

The instant decision has been cited approvingly and followed by the Court of Appeals for the Second Circuit. In *Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (July 8, 1980), the Second Circuit Court of Appeals considered in great detail the possible effects of *Redington, supra*, as well as other recent decisions of this Court, upon the four-pronged *Cort* v. *Ash* analysis. Both *Redington* and *Transamerica* were inapposite to the determination of whether a private remedy would be inferred from the provisions of the CEA, because the statutes construed in those decisions (Section 17(a) of the 1934 Securities Exchange Act and Section 206 of the 1940 Investment Advisers Act, respectively) were both enacted *prior* to the great explosion in judicial recognition of implied rights and the legislative history of both statutes was "entirely silent" on the availability of an implied private remedy. On the other hand, numerous references in the legislative history of the CEA illustrated Congressional acceptance and approval of the implied private remedy which had previously been assumed under the CEA. The Second Circuit Court of Appeals found that "the legislative history and the circumstances of (a statute's) enactment evince a clear intent to preserve a private cause of action." See

Sec. Reg. & L. Rep. No. 563, p. H-14 (July 23, 1980) (excerpts from *Leist* v. *Simplot* opinion).

Moreover, the decision reached by the Court of Appeals in the instant case is imminently fair. If this Court should decide that the CEA provides no implied private remedy, then respondents would be left with *no* federal remedies available to them.

Finally, the decision reached by the Court of Appeals is consistent with the viewpoint expressed by the Commodity Futures Trading Commission. As the Court of Appeals noted (Page A-28):

> The CFTC has interpreted the Act as implicitly authorizing private actions, and asserts that the right must be presumed to have survived the 1974 amendments unless Congress explicitly abolished the private remedy in enacting the amendments. Statements of CFTC Concerning Referral of Private Litigation Under the Doctrine of Primary Jurisdiction. 41 Fed. Reg. 18471 (May 5, 1976). See also *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) (amicus brief submitted by CFTC).

## III.

**THE ISSUE WHETHER THE COMMODITY EXCHANGE ACT SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION HAS BEEN FAIRLY SETTLED BY THE COURTS OF APPEALS FOR THE SECOND AND SIXTH CIRCUITS, AND NO COMPELLING REASON EXISTS FOR A DECISION BY THIS COURT AT THIS TIME.**

Petitioner contends that the Court of Appeals' implication of a private right of action for fraud under the CEA raises an important question of federal law

that should be settled by this Court. Respondents disagree with this assertion for the following reasons:

(1) Prior to 1974, petitioner admits a "harmony" among the lower federal courts that a private cause of action existed under the CEA. (Page 13). The opinion of the Court of Appeals in the instant case examines pre-1974 case law in greater detail and reaches a similar conclusion (Page A-24, fn. 18).

(2) After 1974, a number of lower federal courts have concluded that no private right of action can be implied from the CEA. Of the nine cases cited by petitioner (Page 14, fn. 34) as directly opposed to the implication of a private remedy, four of these cases no longer represent good law in their own jurisdictions, being reversed either directly or *sub silentio* by the decisions in the instant case and in *Leist, supra*.

(3) The instant case was decided on May 12, 1980. *Leist, supra*, was decided on July 8, 1980. These are the only decisions rendered since 1974 by any Court of Appeals on this issue. Both cases decided that a private cause of action exists for violations of the CEA. It should be anticipated that subsequent decisions by the federal district courts will follow the currently unanimous view among the Courts of Appeal.

(4) Although petitioner contends that this issue is an important legal issue which should be finally resolved, it is interesting that the Court of Appeals observed that "no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal." (Page A-24). Nor is this the only case in which this petitioner has failed to question the validity of implied rights of action under

the CEA. See *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1176 (2d Cir. 1977) ("It is agreed that there is an implied cause of action under the Act (CEA) for a private remedy"). Petitioner, in effect, wishes to raise this issue for the first time via petition for certiorari to this Court. This Court, in order properly to decide this issue, should defer resolution of this issue until it has been effectively briefed and argued in the lower courts, so that the opinions reached by the courts below and the entire record of the case will provide this Court with a greater ability to reach a fair and just decision.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 4, 1980

# APPENDIX

## DESIGNATION OF PORTIONS OF TRANSCRIPT AND STATEMENT OF ISSUES ON APPEAL

(United States District Court
Eastern District of Michigan
Southern Division)

(J. J. Curran, et al., Plaintiffs, vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., a Delaware corporation, Defendant. Civil No. 6-70683)

NOW COME the Appellants herein and pursuant to Federal Rule of Appellate Procedure 10(b) hereby provide notice to the Appellee that Appellants do not intend to include in the record on appeal any transcript.

Appellants further state that the issues they intend to present on appeal are as follows:

1. Whether Plaintiffs' Complaint states a cause of action under the Securities Act of 1933, 15 U.S.C. § 77(a) et seq. and the Securities Exchange Act of 1934, 15 U.S.C. § 78(a), et seq.

2. Whether plaintiffs purchased an "investment contract" and thus a "security" or "securities" within the meaning of the Securities Act of 1933, and the Securities Exchange Act of 1934, from Defendant.

3. Whether plaintiffs purchased a "security" within the meaning of said acts when they agreed with defendant to participate in a common enterprise.